AU MENG NAM & ANOR

v.

UNG YAK CHEW & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
HASAN LAH JCA
[CIVIL APPEAL NO: J-01-82-2005]
12 JULY 2007

LAND LAW: *Indefeasibility of title and interests - Forged transfer - Whether purchaser acquired indefeasible title - Whether words "to whom it may subsequently be transferred" in s. 340(3)(a) NLC referred to immediate purchaser or subsequent purchaser - Whether Adorna Properties Sdn Bhd v. Boonsom Boonyanit decided per incuriam - Whether binding precedent - Whether distinguished - National Land Code, s. 340(2), (3)*

CIVIL PROCEDURE: *Judicial precedent - Court of Appeal - Whether bound by Federal Court case if decided per incuriam - Adorna Properties Sdn Bhd v. Boonsom Boonyanit*

WORDS & PHRASES: *"Provided that in this sub-section" - National Land Code, s. 340 - Whether in reference to subsection (3) or (2) of s. 340*

WORDS & PHRASES: *"to whom it may subsequently be transferred" - National Land Code, s. 340(3)(a) - Whether in reference to immediate purchaser or subsequent purchaser of forged sale of land*

This was the appellants' appeal against the decision of the learned judge who dismissed their claim against the 1st respondent, *inter alia*, for declaratory reliefs that they were the beneficial and legal owners of a piece of land ('the land') which was transferred fraudulently to the 1st respondent. The 2nd and 3rd respondents were the partners of a firm of solicitors who had acted for the 1st respondent for the purchase and the subsequent transfer of the land at the material time. The 1st respondent had a third party indemnity claim against them. The 2nd and 3rd defendants in turn claimed for indemnity against the 4th defendant, the Land Administrator whom they alleged was negligent. The main issue was whether the Federal Court case of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* ('*Adorna Properties*') which was followed by the learned judge was applicable in the present case.

Held (allowing appellants' appeal):
Per Gopal Sri Ram JCA

(1) The doctrine of precedent has a lesser effect in a case that involves the interpretation of a section in an Act of Parliament than in a case that establishes a new principle of law. The Federal Court in *Adorna Properties* did not establish any new principle of the common law. It was merely interpreting a section in a statute. If it can be demonstrated that the said case was decided *per incuriam*, no court in this country need follow it. A lower court could impugn a precedent on such grounds (Sir John Salmond in *Treatise on Jurisprudence*). (paras 2 & 4))

(2) The decision in *Adorna Properties* was decided *per incuriam* for the following three reasons. Firstly, s. 340(3) National Land Code ('NLC') applies to subsequent acquirers of land taking from registered proprietors whose titles are defeasible. *Adorna* was not a subsequent purchaser. It took its title from the forger. The Federal Court therefore overlooked the critical words "to whom it may subsequently be transferred" appearing in s. 340(3) NLC. Secondly, the Federal Court overlooked two authorities which held that the NLC provided for deferred indefeasibility, *ie*, *Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors* and *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor*. Thirdly, *Adorna Properties* equated purchasers and registered proprietors. In doing so, the Federal Court clearly overlooked the provisions of s. 5 NLC that defined them separately and differently. Accordingly, the decision in *Adorna Properties* was rendered in ignorance of a statutory provision and as such could not be treated as binding precedent. (paras 12 & 13)

(3) The object and purpose of s. 340 NLC is to protect registered proprietors of land by affording them certainty of titles. This is a just result because it is unfair and unjust that the true owner of land should be deprived of it by the machinations of a rogue. (para 14)

(4) When a court interprets a statute, particularly one which confers rights upon or grants protection to persons generally or a class, its duty is to derive a meaning that is fair or in accordance with the purpose of the particular Act of Parliament. An interpretation should not be placed which will

produce an unsatisfactory or unfair result. There is a presumption that Parliament does not intend an unfair or unjust result. *Adorna Properties* interpreted s. 340 NLC in a manner as to produce an unfair and unjust result. (para 14)

(5) It is central to the doctrine of indefeasibility housed in s. 340 NLC that the issue document of title must itself be genuine. In *Adorna Properties*, the instrument of transfer and other documents were forged. But the title was genuine. In the present appeal, there was cogent evidence going to show that the issue document of title used to effect the transaction itself was a forgery. Hence, *Adorna Properties* was clearly distinguishable from the facts of the case. The learned judge misdirected himself in not holding for the appellants on that ground. (para 17)

(6) The appellants' case must succeed because the vendors had no title to pass. You cannot give what you do not have – *nemo dat quod non habet*. The only exception was in favour of a *bona fide* purchaser for value and the evidence conclusively pointed against the 1st respondent on that issue. (para 17)

Per Raus Sharif JCA (with Hasan Lah JCA concurring)

(1) The Federal Court should review its decision in *Adorna Properties*. By virtue of s. 340(2) NLC, the title of Adorna Properties was not indefeasible as the registration was obtained by forgery. Section 340(3) does not apply to s. 340(2). The words "Provided that in this sub-section" refers to s. 340(3) and not s. 340(2). Further, s. 340(3)(a) refers to "whom it may subsequently be transferred" which means that the intended purchaser is the subsequent purchaser and not the immediate purchaser. Similarly, in the present case, the title of the 1st respondent was defeasible as the registration was obtained by forgery. The 1st respondent was the immediate purchaser and not a subsequent purchaser. Section 340(3) has no application as it refers to a subsequent purchaser and not the immediate purchaser. Thus, the appellants would have succeeded in this appeal if not for the Federal Court interpretation of s. 340 NLC in *Adorna Properties*. To depart from the Federal Court case of *Adorna Properties* would be to go against the doctrine of *stare decisis*. (paras 32, 34 & 35)

A **(2)** The findings of the learned judge did not solely turn on a question of fact. It was a mixed question of fact and law. Even if the learned judge's findings were based on factual ground it did not absolve this court of doing its duty as an appellate court. (para 38)

B **(3)** The existence of a sale and purchase agreement and the payment of the purchase price in full should not be the only indicator to show whether a person was a *bona fide* purchaser or not. Other salient features surrounding the sale and C purchase agreement must be considered. In the present case, the 1st respondent acted hastily. He concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. No doubt he had every right to take advantage of the low price that was offered to him but D he took the risk. When he took such a risk, it should not be at the expense of the appellants. That was because whilst he had a choice, the appellants had none. The appellants could not do anything to prevent the fraud. In such circumstances the court must not favour the 1st respondent over the E appellants. Had the learned judge taken into account relevant facts and consideration surrounding the sale and purchase agreement, he would not have concluded that the 1st respondent was a *bona fide* purchaser under s. 340(3) NLC. (para 41 & 42)

F **(4)** A reasonable inference from the evidence adduced showed that the 1st defendant knew at the time he bought the land that the purchase price was below the market value and that he had taken advantage of it by completing the purchase of the land hastily. In doing so, the 1st respondent disregarded G his obligations to investigate the alleged proprietors and the genuineness of the documents. A purchaser in good faith does not include a purchaser who is careless or negligent. Further, when the 1st respondent failed to take ordinary precautions that ought to be taken in a sale and purchase of land, he was H not entitled to the protection of the court. (para 43 & 44)

(5) The learned judge acknowledged the fact that the consideration paid by the 1st respondent was below government valuation and also the valuation done by the I appellants' valuer. However, he held that that fact could not negative the 1st respondent's status as *bona fide* purchaser

since the appellants failed to adduce evidence of fraud or forgery. Clearly, the learned judge had misdirected himself on the law. Since the 1st respondent was relying on the proviso to s. 340(3) NLC that he was a *bona fide* purchaser for valuable consideration, the evidential burden fell on him. The evidential burden remained with the 1st respondent. There was no duty on the appellants to prove that the 1st respondent was a party or privy to the fraud or forgery. (para 45)

(6) The 1st respondent could not attach any liability against the 2nd and 3rd respondents since no evidence was adduced at the trial to support the allegation that both were negligent. It followed that their claim against the 4th respondent should also be dismissed. (para 47 & 48)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu-perayu terhadap keputusan yang arif hakim kerana menolak tuntutan mereka terhadap responden pertama, antara lain, untuk relif-relif deklaratori bahawa mereka adalah pemilik benefisial dan undang-undang sebidang tanah ('tanah') yang telah dipindahmilik secara fraud kepada responden pertama. Responden-responden kedua dan ketiga adalah rakan kongsi sebuah firma guaman yang bertindak bagi pihak responden pertama untuk pembelian dan pindahmilik tanah pada waktu material. Responden pertama mempunyai tuntutan indemniti pihak ketiga terhadap mereka. Responden-responden kedua dan ketiga sebaliknya menuntut indemniti terhadap responden keempat, Pentadbir Tanah, yang katakan berlaku cuai. Isu utama adalah sama ada kes Mahkamah Persekutuan *Adorna Properties Sdn Bhd v Boonsom Boonyanit* ('*Adorna Properties*') yang telah diikuti oleh yang arif hakim terpakai kepada kes di sini.

Diputuskan (membenarkan rayuan perayu-perayu):
Oleh Gopal Sri Ram HMR

(1) Doktrin duluan tidak mempunyai kesan mendalam dalam kes yang melibatkan pentafsiran terhadap seksyen Akta Parlimen berbanding dengan kes yang mengisytiharkan suatu prinsip undang-undang. Mahkamah Persekutuan dalam *Adorna Properties* tidak mengisytiharkan apa-apa prinsip baru undang-undang common. Ia hanya mentafsir seksyen di dalam statut. Jika ianya dapat ditunjukkan bahawa kes tersebut telah diputuskan secara *per incuriam*, maka tiada keperluan bagi

mahkamah-mahkamah di negara ini untuk mengikutinya. Sebuah mahkamah bawahan boleh mencabar suatu duluan atas alasan-alasan seperti ini (Sir John Salmond dalam *Treatise on Jurisprudence*).

(2) Keputusan di dalam *Adorna Properties* telah diputuskan *per incuriam* atas tiga alasan berikut. Pertama, s. 340(3) Kanun Tanah Negara ('KTN') terpakai kepada pembeli terkemudian tanah yang mengambil milikan dari pemilik-pemilik berdaftar yang mempunyai pegangan yang boleh disangkal. *Adorna* bukan seorang pembeli terkemudian. Ia mengambil milikannya dari seorang pemalsu. Mahkamah Persekutuan dengan itu telah terlepas pandang perkataan penting "to whom it may subsequently be transferred" yang tertera di dalam s. 340(3) KTN. Kedua, Mahkamah Persekutuan juga terlepas pandang dua autoriti yang memutuskan bahawa KTN ada membuat peruntukan mengenai ketaksangkalan tertangguh, iaitu, *Mohammad Buyong v Pemungut Hasil Tanah Gombak & Ors* dan *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor*. Ketiga, *Adorna Properties* telah menyamakan pembeli dengan pemilik berdaftar. Dalam berbuat demikian, Mahkamah Persekutuan jelas terlepas pandang peruntukan s. 5 KTN yang mentafsirkan mereka secara yang berbeza dan berasingan. Oleh yang demikian, keputusan di dalam *Adorna Properties* telah dicapai dengan membelakangi peruntukan statut dan oleh itu tidak boleh dianggap sebagai satu duluan yang mengikat.

(3) Objek dan tujuan s. 340 KTN adalah untuk melindungi pemilik berdaftar tanah dengan memberikan mereka kepastian milikan. Ini suatu natijah yang adil kerana adalah tidak adil bahawa seorang pemilik sebenar tanah harus dinafikan tanahnya atas musibah seorang penipu.

(4) Apabila mahkamah mentafsir statut, terutama statut yang memberi hak atau perlindungan kepada orang ramai atau kepada segolongan orang tertentu, kewajipannya adalah untuk mencungkil suatu maksud yang memberikan keadilan atau yang selaras tujuan Akta Parlimen tersebut. Pentafsiran yang akan menyebabkan ketidakpuasan atau ketidakadilan tidak harus dibuat. Terdapat anggapan bahawa Parlimen tidak berniat untuk melakukan ketidakadilan atau ketidaksaksamaan. *Adorna Properties* sebaliknya telah mentafsir s. 340 KTN dengan cara yang menghasilkan keputusan yang tidak adil dan tidak saksama.

(5) Teras doktrin ketak-sangkalan seperti yang terangkum di dalam s. 340 KTN adalah bahawa geran hakmilik tanah tersebut mestilah sesuatu yang tulen. Dalam *Adorna Properties*, instrumen pindahmilik dan lain-lain dokumen telah dipalsukan. Namun, hakmilik adalah tulen. Dalam rayuan di sini, terdapat keterangan kukuh yang menunjukkan bahawa geran hakmilik yang digunakan untuk memeterai transaksi adalah palsu. Oleh itu, *Adorna Properties* jelas boleh dibezakan dari fakta-fakta kes di sini. Yang arif hakim telah tersalah arah apabila gagal memutuskan untuk perayu-perayu atas alasan ini.

(6) Kes perayu-perayu layak berjaya kerana penjual-penjual tidak mempunyai hakmilik untuk diberi. Anda tidak boleh memberi apa yang anda tidak ada – *nemo dat quod non habet*. Satu-satunya kecualian adalah bagi pembeli *bona fide* untuk nilai dan atas isu ini keterangan jelas tidak memihak kepada responden pertama.

Oleh Raus Sharif HMR (Hasan Lah HMR menyetujui)

(1) Mahkamah Persekutuan harus menyemak keputusannya di dalam *Adorna Properties*. Berdasarkan s. 340(2) KTN, hakmilik Adorna Properties tidak menjadi tak boleh disangkal disebabkan pendaftaran diperolehi melalui penipuan. Seksyen 340(3) tidak terpakai kepada s. 340(2). Perkataan-perkataan "Provided that in this sub-section" merujuk kepada s. 340(3) dan bukannya s. 340(2). Selain itu, s. 340(3)(a) merujuk kepada "whom it may subsequently be transferred" yang bermakna pembeli yang hendak membeli itu adalah pembeli terkemudian dan bukannya pembeli semasa. Begitu juga, dalam kes semasa, hakmilik responden pertama adalah boleh disangkal disebabkan pendaftarannya diperolehi melalui penipuan. Responden pertama adalah pembeli semasa dan bukannya pembeli terkemudian. Maka s. 340(3) tidak terpakai disebabkan ia merujuk kepada seorang pembeli terkemudian dan tidak kepada pembeli semasa. Oleh itu, perayu-perayu sepatutnya berjaya dalam rayuan ini jika tidak kerana pentafsiran yang diberi oleh Mahkamah Persekutuan terhadap s. 340 KTN di dalam *Adorna Properties.* Namun, untuk menyimpang dari kes *Adorna Properties Sdn Bhd* akan menyalahi doktrin *stare decisis*.

(2) Dapatan yang arif hakim tidak semata-mata tertumpu kepada persoalan fakta. Ia tertumpu kepada campuran persoalan fakta dan undang-undang. Jikapun dapatan yang arif hakim didasarkan kepada alasan faktual, itu tidak menghalang mahkamah ini dari melaksanakan tanggungjawabnya sebagai sebuah mahkamah rayuan.

(3) Kewujudan perjanjian jual beli dan pembayaran penuh harga belian tidak harus menjadi penanda tunggal bagi menunjukkan sama ada seseorang pembeli itu pembeli *bona fide* ataupun tidak. Ciri-ciri utama lain yang mengelilingi perjanjian jual beli perlu juga dipertimbang. Dalam kes semasa, responden pertama bertindak dengan cara tergesa-gesa. Beliau telah melaksanakan penjualan tanpa meneliti hakmilik atau orang-orang yang mendakwa sebagai pemilik-pemilik. Memanglah beliau mempunyai segala hak untuk mengambil peluang atas harga yang rendah itu, namun beliau telah mengambil risikonya. Apabila beliau mengambil risiko sedemikian, maka ia tidak seharusnya menjejaskan perayu-perayu. Ini kerana ia mempunyai pilihan sedangkan perayu-perayu tidak. Perayu-perayu tidak dapat berbuat apa-apa untuk menghalang fraud. Dalam keadaan sedemikian, mahkamah tidak harus menyebelahi responden pertama dengan membelakangi perayu-perayu. Sekiranya yang arif hakim mengambilkira pertimbangan dan fakta-fakta relevan di sekitar perjanjian jual beli, nescaya beliau tidak akan merumuskan bahawa responden pertama adalah seorang pembeli *bona fide* di bawah s. 340(3) KTN.

(4) Berdasarkan keterangan yang dikemukakan, satu inferens munasabah yang boleh dibuat adalah bahawa responden pertama tahu semasa beliau membeli tanah bahawa harga belian adalah di bawah paras harga pasaran, tetapi beliau telah mengambil peluang tersebut dengan menyempurnakan pembelian tanah secara tergesa-tergesa. Dengan berbuat demikian, responden pertama telah mengenepikan obligasinya untuk menyiasat siapakah pemilik-pemilik tanah serta mengenai ketulenan dokumen-dokumen. Seorang pembeli suci hati tidak merangkumi seorang pembeli yang cuai atau kurang peduli. Memandangkan responden pertama gagal mengambil langkah berjaga-jaga biasa dalam urusan jual beli tanah, maka beliau tidak berhak kepada perlindungan mahkamah.

(5) Yang arif hakim mengakui fakta bahawa harga yang dibayar oleh responden pertama adalah di bawah paras penilaian kerajaan dan penilaian yang dibuat pentaksir perayu-perayu. Bagaimanapun, beliau memutuskan bahawa fakta tersebut tidak boleh menidakkan status responden pertama sebagai pembeli *bona fide* kerana perayu-perayu gagal menunjukkan perlakuan fraud atau pemalsuan. Jelas bahawa yang arif hakim telah tersalah arah akan dirinya di sisi undang-undang. Oleh kerana responden pertama bergantung kepada proviso s. 340(3) KTN untuk menyatakan bahawa beliau adalah seorang pembeli *bona fide* untuk balasan bernilai, maka beban membukti adalah dipikul olehnya. Beban membukti masih terus ditanggung oleh responden pertama. Perayu-perayu tidak menanggung sebarang beban untuk membuktikan bahawa responden pertama adalah pihak atau privi kepada fraud atau pemalsuan.

(6) Responden pertama tidak boleh meletakkan apa-apa liabiliti ke atas responden-responden kedua dan ketiga disebabkan tiada keterangan dikemukakan di perbicaraan untuk menyokong dakwaan bahawa mereka berlaku cuai. Ianya mengikut bahawa tuntutan terhadap responden keempat juga harus ditolak.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Bhup Narain Singh v. Gokhul Chand Mahton LR 61 IA 115 ***(refd)***

Bissonauth v. The Sugar Fund Insurance Bond [2007] UKPC 17 ***(refd)***

Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1995] 4 CLJ 45 HC ***(refd)***

Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Brennan v. Comcare [1994] 122 ALR 615 ***(refd)***

Carter v. Bradbeer [1975] 1 WLR 1204 ***(refd)***

Coghlan v. Cumberland [1898] 1 Ch 704 ***(refd)***

Donoghue v. Stevenson [1932] AC 562 ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Kesarmal & Anor v. Valliappa Chettiar [1954] MLJ 119 ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 FC ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 SC ***(refd)***

Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors [1982] 2 MLJ 53 ***(refd)***

Muthammah v. Masri Mohamed [2000] 2 CLJ 186 HC ***(refd)***

A *Oliver v. Hinton [1899] Chancery Division 264* ***(refd)***
Pesuruhjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors [1971] 2 MLJ 30 ***(refd)***
Subramaniam v. Sandrakasan [2005] 3 CLJ 539 CA ***(refd)***
Tan Heng Chew v. Tan Kim Hor [2006] 1 CLJ 577 FC ***(refd)***
B *'The Boucraa' [1994] 1 All ER 20* ***(refd)***
Teh Bee v. Maruthamuthu [1977] 2 MLJ 7 ***(refd)***
Winterbottom v. Wright [1842] 152 ER 402 ***(refd)***

Legislation referred to:
National Land Code, ss. 5, 340(1), (2)(b), (3)

C **Other source(s) referred to:**
John Salmond, *Treatise on Jurisprudence*, 12th edn, pp 151-2
Professor Teo Keang Sood, *Demise of Deferred Indefeasibility Under the Malaysia Torrens System?*, Singapore Journal of Legal Studies, 2002, pp 403-408

D *For the appellants - Ng Chew Hor; M/s Ng Fan & Assoc*
For the 1st respondent - Wong Kim Fatt (J Jayaperakash & Wong Boon Lee with him); M/s Tam Cheng Yau & Co & M/s Anandan Krishnan & Partner
For the 2nd & 3rd respondents - George Neo (YH Ngu with him); M/s Yeo,
E *Tan, Hoon & Tee*
For the 4th respondent - Abdul Rashid Sudin, State Johor Advisor

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-155-1998(1)]

Reported by Usha Thiagarajah
F

JUDGMENT

Gopal Sri Ram JCA:
G

[1] I have had the advantage of reading the judgment of my learned brother Raus Sharif in draft and agree with the conclusion he has arrived at and the orders he proposes to make in this appeal. However I wish to give my own reasons in addition to
H those already given by my learned brother. The first has to do with the value of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 as binding precedent. The second is this. Even if the decision in *Adorna Properties* is good law, does what was there held apply to the facts of this case? In order to deal with
I the first point, it is necessary to hearken to the statutory scheme which creates indefeasibility of title to land.

[2] Let me take the first point. I begin with the concept of a binding precedent. In the hierarchy of a common law system of judicature, it is a general rule that the decisions of a higher court are binding on all courts below it. So, the decisions of an apex court are binding upon all courts below it. This practice of following the decisions of a higher court is often referred to as the doctrine of binding precedent or of stare decisis. Its object is to ensure certainty in the law. But then there are precedents and there are precedents. Some decisions of the highest court lay down a principle of common law that alters the position that obtained earlier. For example, until *Donoghue v. Stevenson* [1932] AC 562, the common law did not recognise that the manufacturer of a product owed a duty of care to the ultimate consumer. See, *Winterbottom v. Wright* [1842] 152 ER 402. But the House of Lords in *Donoghue v. Stevenson* altered that position. Such a decision is, of course, binding because it established a new principle of law. This is an example of a true precedent. But where you have a case which involves the interpretation of a section in an Act of Parliament the doctrine of precedent has a lesser effect. See, *Carter v. Bradbeer* [1975] 1 WLR 1204, per Lord Diplock.

[3] Gummow J explained the difference between the interpretation of a statute and that of a judgment of a court in *Brennan v. Comcare* [1994] 122 ALR 615 as follows:

> The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given.
>
> The distinction is usefully expressed in the following passage from Judge Posner's work *'The Problems of Jurisprudence'*, 1990, p 248:
>
> > Translation may be imperfect and alter the meaning of the original doctrine; nevertheless many common law doctrines have a stable meaning, though expressed in a variety of different ways. We are not afraid that we would lose the meaning, of negligence if we put it in different words from those used by Learned Hand, or William Prosser, or some other authoritative expositor of the concept.

> Statutory law differs in that the statutory text the starting point for decision, and in that respect (but only that respect) corresponding to judicial opinions in common law decision making – is in some important sense not to be revised by the judges, not to be put into their own words. They cannot treat the statute as a stab at formulating a concept. They have first to extract the concept from the statute – that is, interpret the statute. (There is a sense in which common law judges 'interpret' common law, but it is the sense in which 'interpretation' means 'understanding'.)

[4] It is important to recognise that the Federal Court in *Adorna Properties* was not laying down any new principle of the common law. It was merely interpreting a section in a statute. If it can therefore be demonstrated that *Adorna Properties* was decided *per incuriam*, no court in this country need follow it. As Sir John Salmond said in his *Treatise on Jurisprudence* (12th edn) at pp. 151-2:

> A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, ie, delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (*London Street Tramways v. L. C. C.* [1898] AC 375) and for the Court of Appeal it was given as the leading example of a decision per incuriam which would not be binding on the Court (*Young v. Bristol Aeroplane Co. Ltd.* (194) KR at 729 (CA)) The rule apparently applies even though the earlier Court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a Court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuria as to vitiate the decision. **Even a lower Court can impugn a precedent on such grounds.** (emphasis added.)

[5] Before I comment on *Adorna Properties* let me begin with s. 340 of the Code. It has been set out in full by my learned brother in his judgment. For that reason I will merely refer to but not reproduce it. In its first sub-section it protects "the person for the time being registered as proprietor" of land against impeachment of his or her title. The phrase "for the time being" identifies the point of time at which indefeasibility of proprietorship is to be ascertained, namely, when action is filed to impeach the registered proprietor's title. In general terms what s. 340(1) amounts to is this. If your name appears on the register document of title then you are the owner of the land as against the whole world. As Abdul Malik Ishak J put it in *Muthammah v. Masri Mohamed* [2000] 2 CLJ 186:

> It is now trite law that upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s. 340(1) of the National Land Code 1965). The phrase 'indefeasible title' means a title or an interest which is free of all adverse claims or encumbrances not noted in the register. It is quite obvious that the effect of registration is to defeat all prior unregistered claims.

[6] The other side of the same coin is this. Even if the registered proprietor acquired his title unlawfully, that is to say, in breach of written law, he may nevertheless assert it against the whole world until proceedings are brought to remove him from the register. And that is really the effect of s. 340(1) of the Code. The decision of the former Federal Court in *Teh Bee v. Maruthamuthu* [1977] 2 MLJ 7 exemplifies the proposition.

[7] In that case, the defendant was in occupation of certain land of which the plaintiff was the registered proprietor. He had been there for a very long time – since 1952. He occupied it by virtue of a temporary occupation licence which had been issued to him by the appropriate authority. The plaintiff had obtained registration of her title in breach of the express provisions of the Code which the State Authority had failed to observe. The plaintiff brought an action against the defendant in the magistrate's court for vacant possession. In his defence, the defendant denied that the plaintiff was the registered proprietor of the land. He said that the State Authority had acted unlawfully in issuing the title to the plaintiff. He also said that the plaintiff's title was invalid because it had been obtained by fraud, misrepresentation and by unlawful means. He however did not file an action against the plaintiff and the State Authority claiming a declaration of invalidity and consequential orders. There was simply no frontal attack on the plaintiff's title. This proved fatal. Because, what remained was only the issue whether the plaintiff's name appeared on the register. It did. And on that ground she was entitled to succeed. As Ali Acting CJ (Malaya) said:

> There is also another much more important reason why this appeal should be allowed. Under the Torrens System the register is everything. … In *Creelman & Anor. v. Hudson Bay Insurance Company* [1920] AC 194 which was an appeal from British Columbia, Lord Buckmaster delivering the judgment of the Judicial Committee said on page 197:

> Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in section 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.

[8] Let me re-emphasise that *Maruthamuthu*'s case was decided in the way it was because there was no attack on the plaintiff's title. The defendant merely attempted to defend himself by relying on the unlawful way in which the plaintiff had acquired her title. That is insufficient. Absent direct and frontal attack upon the title of a registered proprietor s. 340(1) insulates him completely.

[9] I now turn to s. 340(2). This carves out three circumstances in which the title of "the person for the time being registered as proprietor" "shall not be indefeasible". In *Kesarmal & Anor v. Valliappa Chettiar* [1954] MLJ 119, the Privy Council held that the latter phrase means "that the title of a proprietor is liable to be defeated." A registered proprietor's title is – to use the words of the Judicial Committee – "liable to be defeated" only in an action brought for that purpose. In other words, there cannot be a collateral attack upon a registered title. This reinforces the point I made earlier in this judgment. It follows that s. 340(2) qualifies s. 340(1) to afford a registered proprietor interim protection of his or her title. Put differently, the title of a registered proprietor remains indefeasible until it is successfully impeached in proceedings properly brought for that purpose by a person having *locus standi* to bring an action. Let me illustrate. V is the registered proprietor of Blackacre and holds the issue document of title. R, pretending to be V obtains a duplicate issue document to Blackacre. R then transfers Blackacre to P for valuable consideration. P is innocent. P would acquire a title to Blackacre that is indefeasible against the whole world except V or any person claiming through or under V. So, if P brings an action for ejectment against T, a trespasser on Blackacre, T cannot resist those proceedings by alleging that P's title is defeasible because of the forgery. Neither will T succeed in an action to impeach P's title because he lacks standing. However, P's title remains defeasible as against V and V may bring an action to recover Blackacre from P.

[10] But what if P transfers Blackacre to X? Can V recover his land from X? The answer to this question is provided by s. 340(3). The subsection makes plain that the title remains defeasible in the hands of subsequent acquirers – X in the example given – or indeed anyone X may transfer Blackacre to. This is because it uses the expression "may subsequently be transferred". But, as a matter of policy, a line must drawn beyond which the title to Blackacre must be put beyond the reach of V. And the Code in the proviso to s. 340(3) draws that line at the door of a purchaser who acquires title from a registered proprietor in good faith and for valuable consideration. So in the example provided, if X acquired Blackacre from P or took a charge or lease of it from P in good faith and for valuable consideration, then X will obtain a title that is indefeasible even as against V. Since the proviso applies only to a subsequent purchaser it cannot and does not apply to P.

[11] I now turn to *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* where the facts were these. The plaintiff, Boonsom was the owner of a valuable piece of land. The original title to her land was in her possession. A rogue, pretending to be the plaintiff, obtained a duplicate of the title. The plaintiff's land was then sold and transferred to the defendant by means of forged documents. The plaintiff brought an action to recover her land. She had been the registered proprietor. She had been deprived of her proprietorship by a forgery. And the defendant had got itself onto the register by means of a forged instrument. Its title was therefore defeasible. Yet the plaintiff failed. Because the Federal Court read the proviso to sub-section (3) as qualifying subsection (2) by equating the expressions "registered proprietor" and "purchaser" both of which appear in s. 340.

[12] In my judgment, the decision in *Adorna Properties* is not to be treated as binding precedent because it was decided *per incuriam*. There are three reasons for this. First, it is plain as a pike staff that s. 340(3) applies to subsequent acquirers of land, taking from a registered proprietor whose title is defeasible in the sense I have discussed earlier in this judgment. Adorna was not a subsequent purchaser. It took its title from the forger. The Federal Court therefore overlooked the critical words "to whom it may subsequently be transferred" appearing in s. 340(3). Second, the Federal Court in *Adorna Properties* when arriving at its decision

overlooked at least two authorities which hold that the Code provides for deferred indefeasibility. In *Mohammad bin Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53, Hashim Yeop A Sani J (later CJ (Malaya)) said this:

> What the appellant is claiming is in fact the protection of section 340 of the National Land Code. The doctrine carried in section 340 is the doctrine of indefeasibility. What that section protects is that the title or interest of any person for the time being registered as proprietor of any land shall be indefeasible. Subsection (2) of the section provides for the exceptions in that the title or interest shall not be indefeasible in any case of fraud or misrepresentation or where registration was obtained by forgery or by means of an insufficient or void instrument or where the title or interest was unlawfully acquired. **This provision deals with what is called 'deferred indefeasibility'** about which we are not presently concerned. (emphasis added)

Then there is the judgment of the Supreme Court, the immediate precursor of the Federal Court in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15. In that case, Wan Yahya SCJ said:

> In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility, – see *Gibbs v. Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside.

Neither of these authorities were cited by the Federal Court in its judgment. Nor was any reason given why the judgment of Hashim Yeop A Sani J in *Mohammad bin Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53, which was quoted in the judgment of this court was wrong and ought not to be followed.

[13] Third, *Adorna Properties*, as I have already said, equated purchasers and registered proprietors. Here is the passage in which it did that:

> The proviso to sub-s (3) of s. 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are these proprietors?

> The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.

In so doing, the Federal Court clearly overlooked the provisions of s. 5 of the Code which defines them separately and differently as follows:

> 'proprietor' means any person or body for the time being registered as the proprietor of any alienated land;
>
> 'purchaser' means a person or body who in good faith and for valuable consideration acquires title to, or any interest in land.

Accordingly, the decision in *Adorna Properties*, to use the words of Sir John Salmond in the passage already quoted, "was rendered in ignorance" of a statutory provision and as such cannot be treated as binding precedent.

[14] There is a further point that needs to be made. The object and purpose of s. 340 is to protect registered proprietors of land by affording them certainty of title. This is a just result because it is unfair and unjust that the true owner of land should be deprived of it by the machinations of a rogue. When a court interprets a statute, particularly one which confers rights upon or grants protection to persons generally or a class, its duty is to derive a meaning that is fair, or in accordance with the purpose of the particular Act of Parliament. Put differently, an interpretation should not be placed which will produce an unsatisfactory or unfair result. Indeed, there is a presumption that Parliament does not intend an unfair or unjust result. See, *Pesuruhjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors* [1971] 2 MLJ 30; *'The Boucraa'* [1994] 1 All ER 20; *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529. This is the approach that the Privy Council adopted in the very recent case of *Bissonauth v. The Sugar Fund Insurance Bond* [2007] UKPC 17 (decided on 19 March 2007). In the advice of the board, delivered by Lord Neuberger of Abbotsbury, you will see several references to the criteria of fairness and justice when interpreting the statute that fell for consideration in that case. Now, as may be seen from what I have said thus far, *Adorna Properties* interpreted s. 340 in a manner as to produce an unfair and unjust result. This is an added reason why *Adorna Properties* should not be followed.

[15] It is no exaggeration to say that *Adorna Properties* has wreaked havoc in the law of real property. All you have to do is to read our national newspapers. You will find news stories of innocent landowners who have found themselves deprived of their land by forged instruments of dealing. There is no question that law as it stands today favours forgers. In *Subramaniam v. Sandrakasan* [2005] 3 CLJ 539, I summed up the effect of Adorna Properties as follows:

> As a registered proprietor you can cling on to your issue document of title for dear life. Yet a rogue may by the use of forged documents obtain a duplicate of the issue document of title claiming the original to be lost and sell and transfer your land to a perfectly innocent purchaser. That is what happened in the *Boonsom Boonyanit* case. Yet, according to the judgment of the Federal Court, you cannot recover your property.

[16] I am therefore prepared to hold for the appellants for the reasons already advanced. However, even if *Adorna Properties* is binding (which I say it is not), then I turn to the second question: does it apply to the facts of the present instance to protect the first respondent?

[17] It is central to the doctrine of indefeasibility housed in s. 340 that the issue document of title must itself be genuine. In *Adorna Properties*, the instrument of transfer and other attendant documents were forged. But the title was genuine. In the present appeal I accept the submission of learned counsel for the appellant that there is cogent evidence going to show that the issue document of title used to effect the transaction here was itself a forgery. Hence *Adorna Properties* is clearly distinguishable from the facts of this case. In my judgment the learned judge misdirected himself in not holding for the appellants on this ground. The appellant's case must succeed because the vendors had no title to pass. You cannot give what you do not have – *nemo dat quod non habet*. And the only exception is in favour of a *bona fide* purchaser for value. See, *M & J Frozen Food*. As my learned brother Raus Sharif has demonstrated in his judgment, the evidence conclusively points against the respondent on this issue. The burden of proving that he is a *bona fide* purchaser lay on the respondent (*Bhup Narain Singh v. Gokhul Chand Mahton* LR 61 IA 115) and he plainly failed to discharge it.

Raus Sharif JCA:

[18] This is an appeal against the decision of the High Court Johor Bahru which dismissed the plaintiffs' claim against the 1st defendant with costs. The plaintiffs had in their statement of claim sought for the following reliefs:

(a) a declaration that they are the beneficial and legal owners of land held under Geran Mukim No. 312 Mukim Pulai, in the State of Johor ("the said land");

(b) a declaration that the transfer of the said land to the 1st defendant was void;

(c) an order that the endorsement of the transfer on the issue document of title of the said land be cancelled and the Land Administrator, do effect the necessary cancellation;

(d) general damages; and

(e) interest and costs.

[19] The plaintiffs, Au Meng Nam and Au Ming Kong, were previously the registered proprietors of the said land. On 17 September 1997, they came to know that the said land had been transferred to the 1st defendant, Ung Yak Chew *vide* the registration of the memorandum of transfer in Form 14A on 9 October 1996.

[20] The plaintiffs contended that they had never entered into any agreement or signed any document to transfer of the said land to the 1st defendant. What happened was, two rogues claimed to be the proprietors of the said land entered into a sales and purchase agreement of the said land with the 1st defendant. This took place on 9 May 1996.

[21] Hence, on 18 September 1997 the plaintiffs lodged a police report stating that the transfer of the said land to the 1st defendant was fraudulent. They subsequently brought this action against the 1st defendant.

[22] The 1st defendant in his defence contended that he was a *bona fide* purchaser of the said land for valuable consideration within the proviso to s. 340(3) of the National Land Code 1965 ("Code") and thus had obtained an indefeasible title to the said land. The 1st defendant, as a fall back position, filed a third party

notice against Lau Kok Guan ("2nd defendant") and Chuah Chong Ying ("3rd defendant") for compensation or indemnity. He alleged that the 2nd and 3rd defendants were negligent.

[23] The 2nd and 3rd defendants were at the material time, the partners of Messrs Lau Kok Guan & Partners, the firm of solicitors acting for the 1st defendant for the purchase and subsequent transfer of the said land. The 2nd and 3rd defendants denied of any negligence on their part. They too, as a fall back position, brought in the Pentadbir Tanah Daerah Johor Bahru ("the 4th defendant") as the fourth party to this action, claiming for contribution or indemnity. They in turn alleged that the 4th defendant was negligent.

[24] On 26 August 2005, the learned trial judge after a full trial, dismissed the plaintiffs' claim. He found it as a fact that the instrument of transfer of the said land to the 1st defendant was a forged document. Nevertheless, applying the Federal Court case of *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit* [2001] 2 CLJ 133 ("Adorna Properties Sdn. Bhd.") he held that the 1st defendant was a *bona fide* purchaser for value within the proviso to s. 340(3) of the Code and thus had acquired an indefeasible title to the said land.

[25] One of the main issues raised by the plaintiffs in this appeal was that the learned trial judge was wrong to rely on the case of *Adorna Properties Sdn. Bhd.* Mr. Ng Chew Hor, learned counsel for the plaintiffs submitted that *Adorna Properties Sdn. Bhd.* was decided per incuriam and should not be followed.

[26] It is therefore necessary to undertake a careful examination of *Adorna Properties Sdn. Bhd.* The facts of that case are these. Mrs. Boonsom Boonyanit was a Thai national. She owned two pieces of land in Tanjong Bungah, Penang. A rogue forged her signature, sold and subsequently transferred her two pieces of land to Adorna Properties. She discovered the fraud only after Adorna Properties was registered as the owner of the two pieces of land. She brought an action against Adorna Properties in order to have her name restored on the register as the owner of the property.

[27] During the trial, Adorna Properties argued that as an innocent third party purchaser for value, its title was indefeasible notwithstanding the forged signature on the memorandum of transfer and relied on s. 340 of the Code. Section 340 reads as follows:

(1) The title or interest of any person or body for the time being registered as proprietors of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy, or;

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument;

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

(a) it shall be liable to be set-aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set-aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body, claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any written law for the time being in force, or any power of avoidance conferred by any such law, or

(b) the determination of any title or interest by operation of law.

[28] The High Court in interpreting the above provisions held that even if the instrument of transfer was forged, Adorna Properties had nevertheless acquired indefeasible title over the property by virtue of s. 340(3) of the Code, which protects any title or interest acquired by any purchaser in good faith and for valuable consideration. (See *Boonsom Boonyanit v. Adorna Properties Sdn. Bhd.* [1995] 4 CLJ 45). Hence, the High Court ruled in favour of Adorna Properties.

[29] The Court of Appeal interpreted the above provisions differently. (See *Boonsom Boonyanit v Adorna Properties Sdn. Bhd.* [1997] 3 CLJ 17). The Court of Appeal held that the words 'any purchaser' in s. 340(3) of the Code refers to a subsequent and not to an immediate purchaser. My learned brother, Gopal Sri Ram JCA speaking for the Court of Appeal held:

> … the words 'any purchaser' appearing in the proviso to s. 340 (3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second sub-s to s. 340 of the Code. Any other construction would, in our view, denude sub-s (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith, pays the purchase price, then, the latter, as well as all those who come onto the register after him, take title free of any taint.

[30] Accordingly, the Court of Appeal decided in favour of Mrs. Boonsom Boonyanit. However the Federal Court overruled the decision of the Court of Appeal. Eusoff Chin CJ reasoned as follows:

> The proviso to sub-s (3) of s. 340 of the NLC deals with only class or category of registered proprietors for the time being. It excludes from the main provisions of sub-s (3) this category of registered proprietors so that these proprietors are not caught by main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provisions of sub-s (3). For this category of registered proprietors, they obtained immediately indefeasibility notwithstanding that they acquired their titles under a forged document.

> We therefore, agree with the High Court Judge that, on the facts of this case, even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said land.

[31] Much criticism had been levelled against the Federal Court's decision in *Adorna Properties Sdn. Bhd.* To some, the Federal Court's decision was plainly wrong and should be disregarded. (See *Subramaniam Ns Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539). Associate Professor Teo Keang Sood of the Faculty of Law, National University of Singapore in an article *"Demise of Deferred Indefeasibility Under the Malaysia Torrens System?"* (Singapore Journal of Legal Studies, 2002, pp 403-408) writes:

> Having misconstrued the legislative intent as embodied in section 340, the case of *Adorna Properties Sdn. Bhd.* is clearly wrongly decided on the issue of indefeasibility involving forgery and should not be followed. Whatever may be the advantages of immediate indefeasibility, it is for Parliament, to change the law, and until that is done, it is for the Courts to interpret the law as it stands.

[32] The learned trial judge did not heed to the call of Professor Teo. I can understand the learned trial judge's reluctance to depart from the Federal Court's decision. I join his view. To depart would be to go against the doctrine of *stare decisis*. Speaking on the subject of doctrine of *stare decisis* Steve Shim CJ (Sabah & Sarawak) in *Tan Heng Chew v. Tan Kim Hor* [2006] 1 CLJ 577 said:

> It is axiomatic to state that the doctrine of *stare decisis* has become the cornerstone of the common law system practiced in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability.

His Lordship further stated that:

> Judicial hierarchy must be observed in the interest of finality and certainty in the law and for orderly development of legal rules as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system.

[33] Abdul Hamid Mohammad FCJ in the same case speaking on the same subject said:

> … judgments of the Federal Court, are binding on the Court of Appeal. Whether the Court of Appeal agrees with them or not, it is incumbent upon it to apply the test. However, if the court thinks that it has good reasons for disagreeing with the judgments, it may, while following them, point out why they should be reviewed by this court. Until it is actually done by this court, they remain binding on the Court of Appeal.

[34] Taking the cue from the above observation of Abdul Hamid Mohammad FCJ, it is my respectful view that the Federal Court should review its decision in *Adorna Properties Sdn. Bhd.* To me, by virtue of s. 340(2)(b) of the Code, the title of Adorna Properties was not indefeasible as the registration was obtained by forgery. Section 340(3) does not apply to s. 340(2). The proviso states "Provided that in this sub-section" and this sub-section refers to s. 340(3) and not s. 340(2). Section 340(3)(a) refers to "to whom it may subsequently be transferred" which means that the intended purchaser is the subsequent purchaser and not the immediate purchaser.

[35] Similarly, in the instant case, the title of the 1st defendant is defeasible as the registration was obtained by forgery. The 1st respondent was the immediate purchaser and not a subsequent purchaser. Section 340(3) has no application as it refers to subsequent purchaser and not the immediate purchaser. Thus, the plaintiffs would have succeeded in this appeal if not for the Federal Court interpretation of s. 340 of the Code in *Adorna Properties Sdn. Bhd.* But for the reasons given earlier, I am not ready to ignore or disregard the Federal Court's decision in *Adorna Properties Sdn. Bhd.*

[36] Thus, what need to be decided now is whether the learned trial judge was right in holding that the 1st defendant was a *bona fide* purchaser of the said land for valuable consideration so as to fall within the exception to defeasibility under s. 340(3) of the Code. Mr. Ng Chew Hor submitted that the learned trial judge had misdirected himself on the law and evidence adduced at the trial in holding that the 1st defendant was a *bona fide* purchaser. Mr. Wong Kim Fatt, learned counsel for the 1st defendant, submitted otherwise. According to him, the findings of the learned trial judge were findings of facts and this court, as an appellate court, should be slow in interfering with such findings.

[37] With utmost respect and having read and re-read the judgment under appeal, I do not think that the findings of the learned trial judge turns solely on the question of fact. The learned trial judge in concluding that the 1st defendant was a *bona fide* purchaser said:

> The question arises whether on the evidence presented herein the Court can safely conclude that the defendant is not a *bona fide* purchaser for valuable consideration so as to fall within the exception to defeasibility as provided for by the proviso to section 340(3) of the National Land Code. To do so the evidential burden falls on the defendant and upon evaluating the evidence the defendant has on a balance of probabilities successfully discharged the burden.
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> I say so for the following reasons:
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> 1. The sale and purchase agreement speaks for itself in that the defendant is the purchaser of the property in question who has given valuable consideration by payment of the full purchase price.
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> 2. Though the consideration paid was below the Government Valuation of RM1.2 million by the plaintiffs' valuer (SP2) nevertheless to my mind that by itself cannot negative the defendant's status as bona fide purchaser for valuable consideration bearing in mind that the plaintiffs has failed to adduce evidence that the defendant was privy to the fraud and/or forgery. The standard of proof for fraud is proof beyond reasonable doubt and for forgery on a balance of probabilities – see Federal Court decision in *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit* [2001] 2 CLJ 133 in approving *Saminathan v. Pappa* [1981] 1 MLJ 121. The plaintiff's Valuers report to my mind must be approached with caution as it was prepared in 2001 – some five years after the transaction and there were glaring omissions as to the existence and effect of acquisition exercise by the relevant authorities on the said land in 1996 and the acknowledgement by SP2 that consideration need not be adequate as it could be nominal and sufficient. There is no dispute that the defendant paid the full ad valorem stamp based on the adjudicated government valuation of RM1.2 million.
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> 3. The evidence of the defendant that he is illiterate and hence had to engage and relied heavily on the advice of his solicitors ie, the Third Party herein in the purchase of the property which he felt he had a good bargain.

A

4. The corroborative evidence of TPWS-1 that he was handed the original title deeds of the property at his office by the vendors as stated therein and the defendant's testimony that he received the original title deed (P2) duly registered into his name from the third party.

B

[38] It is clear from the above that the findings of the learned trial judge do not solely turn on a question of fact. It was a mixed question of fact and law. Thus, the proposition by Mr. Wong Kim Fatt was not entirely correct. I am also of the view that even if the findings of the learned trial judge was based on factual ground

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it does not absolve this court of doing its duty as an appellate court. Lindley MR in *Coghlan v. Cumberland* [1898] 1 Ch 704 summed up that duty as follows:

> Even where, as in this case, the appeal turns on a question of
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> fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full
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> consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very
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> difficult to estimate correctly the relative credibility of witnesses from written depositions: and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other
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> circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.

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[39] In fact, this court in *Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19, formulated the following test warranting appellate intervention:

> Suffice to say that we re-affirm the proposition that an appellate
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> court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been

no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves. A

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. B C D

[40] On appeal, the Federal Court affirmed the approach taken by this court. (See *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2004] 4 CLJ 309. Steve Shim CJ (Sabah & Sarawak) who delivered the judgment of the court said: E

In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test. F G H

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A In the circumstances and for the reasons stated, there is no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. In our view, what the Court of Appeal had done was merely to accentuate the established plainly wrong test consistently applied by the appellate courts in this country.

B

[41] With the above in mind, I will now examine learned trial judge's reasoning in holding that the 1st defendant was a *bona fide* purchaser for valuable consideration. One of the reasons given was that the sale and purchase agreement speaks for itself. To the C learned trial judge, the 1st defendant was a *bona fide* purchaser and had given valuable consideration because of the existence of the sale and purchase agreement and the purchase price had been paid in full. With respect such reasoning is seriously flawed. An existence of a sale and purchase agreement and the payment of D the purchase price in full cannot be the only indicator to show whether a person is a *bona fide* purchaser or otherwise. Other salient features surrounding the sale and purchase agreement must be considered. In the present case, the learned trial judge failed to take into account the followings:

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(i) The completion date of the sale and purchase agreement was nine months from the date of signing. The purchase price was RM400,000. However, 80% of the purchase price was paid on the date of signing of the agreement, and the balance was paid F three months after the date of signing.

(ii) About three months after the purchase and the said land being registered under his name, the 1st defendant attempted to sell the said land for RM1,200,000. In the attempted sale, the said land was valued for stamping purposes for G RM1,286,000.

(iii) Both the "vendor" possessed only temporary identity cards when the sale and purchase agreement was signed. No queries or searches were made of the relevant authorities.

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(iv) Admission by the 2nd defendant, the solicitors acting for the 1st defendant, during cross examination that if given time, he would be able to write to the Jabatan Pendaftaran Negara, to find out the identity of the "vendors" who came to his office, I with temporary identity cards. However, he did not do so because the 1st defendant insisted in concluding the transaction on the same day.

[42] Had the learned trial judge taken the above facts and circumstances into consideration, he cannot possibly conclude that the 1st defendant was a *bona fide* purchaser for valuable consideration, so as to be protected under s. 340(3) of the Code. To me, the 1st defendant had acted hastily. He concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it cannot be at the expense of the plaintiffs. This is because while he had a choice, the plaintiffs had none. In fact, the plaintiffs were helpless. The plaintiffs could not do anything to prevent the fraud. Even locking the title in a safe would not had help the plaintiffs. In such circumstances the court must not favour the 1st defendant, over the plaintiffs. To do so, would be doing injustice to the plaintiffs.

[43] Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the 1st defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v. Hinton* [1899] Chancery Division 264 Lindley MR said:

> To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgage of her priority would be the greatest injustice.

[44] So too here. The 1st defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.

[45] Another error on the part of the learned trial judge is this. While he acknowledged the fact that the consideration paid by the 1st defendant was below the government valuation and the plaintiffs' valuer but concluded that "that by itself cannot negative the 1st defendant's status as bona fide purchase for valuable consideration bearing in mind that the plaintiffs have failed to

A adduce evidence of the 1st defendant to the fraud or forgery". Clearly, the learned trial judge had misdirected himself on the law. To me, since the 1st defendant was relying on the proviso of s. 340(3) of the Code, that he was a *bona fide* purchaser for valuable consideration, the evidential burden falls on him. The B evidential burden remained with the 1st defendant. There is no duty on the plaintiffs to prove that the 1st defendant was a party or privy to the fraud or forgery.

[46] For the above reasons, I would allow the plaintiffs' appeal C and set aside the order of the High Court in dismissing the plaintiffs' claim against the 1st defendant. The plaintiffs shall be entitled to the declaration that they are the beneficial and legal owners of the said land. There shall also be a consequential order that the endorsement of the transfer *vide* presentation No. 1299/ D 96 be cancelled and the issue document of title be rectified by the 4th defendant. The plaintiffs are entitled to damages to be assessed by the Registrar of the High Court. They are also entitled to costs of this appeal as well as in the court below. The deposit paid into court shall be refunded to the plaintiffs.

E **[47]** The next issue in this appeal is whether the 1st defendant could attach any liability against the 2nd and 3rd defendants. My respectful view is that, no liability could be attached against the 2nd and 3rd defendants. The 1st defendant had adduced no F evidence at the trial to support the allegation that the 2nd and 3rd defendants were negligent. Moreover from the circumstances of the transaction it clearly indicated that the 1st defendant took a commercial decision to purchase the land which he admitted was a good bargain. In a single day, he visited the land, decided to G purchase it and agreed to the term of the sale including an initial payment of 80% of the purchase price in cash. These were done before the 1st defendant consulted the 2nd defendant. The 2nd defendant in his evidence stated that when the 1st defendant came to see him, he informed him (1st defendant) of the risk. But H according to the 2nd defendant, the 1st defendant who was a regular client and was familiar with sales and purchase of real property, wanted to proceed with the transaction and urgently too. The 2nd defendant further testified that instructions were given to him to prepare the terms as have already be agreed upon. I Certainly, under such circumstances the 2nd and 3rd defendants cannot be blamed. Accordingly the 1st defendant's claim against the 2nd and 3rd defendants is dismissed with costs here and the court below.

[48] Since no liability could be attached against the 2nd and 3rd defendants, the 2nd and 3rd defendants claim for contribution or indemnity against the 4th defendant should also be dismissed. In fact no evidence was adduced in these proceedings that the 4th defendant had acted *mala fide* or had committed fraud or forgery or had conspired with anybody. The 4th defendant as the Land Administrator was merely performing his statutory function and duties in the registration of the transfer of the said law. Accordingly the 2nd and 3rd defendants claim against 4th defendant is dismissed with costs here and the court below.

Hasan Lah JCA:

[49] I have had the advantage of reading the judgment of my learned brother Raus Sharif JCA in draft and I am in entire agreement with it. I have nothing more to add.